SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-33

THE FIRESTONE TIRE AND RUBBER COMPANY,
a Corporation,
Petitioner,

vs.

CLIFFORD GRIGGS,
Respondent.

RESPONDENT'S BRIEF

KENNETH L. DEMENT
Attorney at Law
310 West North Street
Sikeston, Missouri 63801

GARY L. GARDNER
EUBANKS, GARDNER & LORENZ
Attorneys at Law
301 West Jefferson
Louisville, Kentucky 40202
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 612 Olive Street 63101 314-231-4477

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The respondent respectfully prays the Supreme Court of the United States to deny the petition of Firestone Tire and Rubber Company for a writ of certiorari and to adjudge to respondent reasonable damages for his delay.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A to Firestone's Petition for Writ of Certiorari) is reported as *Griggs v. Firestone Tire and Rubber Company*, 513 F. 2d 851.

JURISDICTION

Respondent adopts petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with petitioner's inaccurate and unfair presentation of the "question presented" and for that reason feels compelled to clarify same as provided by this Court's Rules 24 and 40.

Nowhere in its opinion did the Court of Appeals directly or by implication assume or hold that the instruction criticized in Firestone's petition was "flatly" or "clearly" or in any other manner erroneous, as depicted by Firestone's counsel.

It is submitted that the question presented for review is, simply, did instruction number 2 in this diversity case correctly set forth the substantive law of Missouri regarding a manufacturer's duty to warn the user of its dangerous product, and (hypothetically) assuming it did not, did petitioner preserve this question for appellate review?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent adopts petitioner's statement.

STATEMENT OF THE CASE

In order to rectify petitioner's inaccuracies and omissions in its Statement of the Case respondent deems it necessary to enlarge and comment thereon. For the convenience of the Court and the parties, respondent will adopt petitioner's method of ref-

erence to the record. Reference to appendices (App.) are to Appendix A and Appendix B printed in Firestone's petition.

Respondent was not injured in 1969; he was injured in *1971* (44; App. A, p. 1a). He was a truck driver who hauled as far away as Tennessee, having done so for approximately ten years prior to the rim explosion which ended that occupation (44, 83, 91; App. A, p. 3a). The trucks he drove were equipped with detachable, multi-piece split rims which came apart (44, 66, 70, 71, 72; App. A, p. 3a), and he had had occasions during that period to fix tires mounted on these rims (44, 91). Firestone's undefined reference to a "professional tire mechanic" does not appear at (83 or 305).

The only marking on the rim base was "Firestone 20x7.5 DA-5°" stamped into the metal (327). Stamped into the metal lock ring and side ring were the symbols "20x9-10" (Pl. Exs. 7 & 8; 49, 297, 337). A person attempting to identify and match these parts was held to know that "9-10" stamped on the lock ring really meant, and was the generic equivalent to "7.33" and that that lock ring was to be used on a rim base bearing the symbol "7.33," not "7.5" (128, 129, 338, 339). Firestone's expert testified that he had no way of knowing how a person like respondent would know the difference (341).

The rim base and side ring with lock ring which injured respondent were available for sale before and probably after his injury, although their design had been judged obsolete by Firestone in 1964 (rim base) and 1967 (side ring with lock ring) (191, 384). Rim parts of the design involved herein had never been recalled by Firestone (361).

The distortion of the lock ring which was not present before and which was caused by the explosion was the only thing which made the lock ring and side ring not serviceable afterwards. The rim base was not damaged and was serviceable both before and after the explosion (51, 92, 129).

While in possession of the prior owner, the truck and its rims had accumulated approximately 400,000 miles and had been involved in about three accidents. These rims were taken off and replaced with extra rims which were kept in a storage place. These extra, or replacement rims included the rim base and side ring and lock ring which injured respondent. Their condition was "okay" and all of them appeared to be interchangeable. The prior owner never received any written information from Firestone about the dangers of mismatching the rims together, or about how to identify different rim sizes (302).

Drummond's Service Station, to whom petitioner refers as a "tire mechanic" put the rim parts together, including the mismatched rim assembly which injured respondent (302, 308).

Some Ford trucks use Firestone wheels. The Ford dealer had never in twenty years seen anything from Firestone which would tell an ordinary person about the dangers of its truck wheel rims (312, 313). The dealer could not tell whether or not the rims were mismatched (315). During the five months in which the dealer had the truck, it was driven approximately 100 to 120 miles without incident (310-312).

During his tire changing operation involving the rim parts which injured him respondent put the split rim back on, inflated the assembly and "pecked" on it to test it and made sure it was "seated right." The rim assembly looked like it was "seated good," as it was "joined together." "Everything was connected" (45-50, 81, 82, 92, 93).

The difference in size and design of the rim base and side ring and lock ring which respondent and the "tire mechanic" failed to notice, and which led to respondent's injury, was infinitesimal, as it was about the thickness of a human fingernail. Such a small difference in rim parts is not capable of detection by the human eye (200, 392).

Firestone claimed it warned people who worked on rim parts by furnishing catalogues in freely available, great quantities to its distributors, on whom it relied to pass them on to the users (323, 394, 395, 396). The assistant manager of Firestone's company owned store in the area could not recall having ever seen any of these catalogues (246, 247, 480, 483). The manager of another Firestone store in the area did not recall ever having been furnished the catalogues (242). An area service station owner/operator who sold Firestone truck wheels and rims, had never been furnished with any such material, although he had requested such from a Firestone distributor, a Firestone store and the Firestone area service man (480, 484, 230, 235).

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

Respondent unequivocally agrees that instruction number 2 (420, 421, 468; also set out at pages 6 and 24a of Firestone's petition) constitutes Firestone's sole matter of contention herein; consequently, respondent's argument will concern itself only with the propriety of that instruction and the action taken (or, rather, not taken) by Firestone in connection therewith.

Firestone's reasoning is founded on the false premise that although Paragraph Fifth of instruction number 2 was allegedly found by the Court of Appeals to be "flatly" "clearly" and "patently" erroneous, as variously (but incorrectly) characterized by Firestone, the Court wrongly dealt with same by finding that the jury was not misled thereby. In response to this, respondent states: (1) that the Court of Appeals by no manner of interpretation held that the criticized instruction was erroneous, especially as contemplated by 28 U.S.C.A. § 2111; (2) that in any event, the instruction correctly hypothesized the substantive law of Missouri regarding Firestone's duty to warn of its dangerous product; and (3) considering arguendo that said instruction was erroneous, the lower court properly held that by failing to properly and timely object thereto at trial as required by Rule 51, Federal Rules of Civil Procedure, Firestone failed to preserve said alleged error for review. Respondent will deal with these three points in the sequence above presented.

I

Petitioner seeks to raise the lower Court's passing, but not condemning remark regarding the instructions to the status of a finding of error. To refute this one need only examine the Court's language contained at page 10a of Firestone's petition. The court did not state that the criticized instruction was errone-

ous, but rather that although the instructions "*may* be regarded as in some *limited* sense ambiguous" (emphasis added), that Firestone's interpretation thereof (as requiring Firestone to seek out and personally warn respondent) was extreme and that there was no real possibility that the jury understood that a personal warning was required, because the proof at trial was addressed to several other means of communicating a warning, including warning literature and a warning impressed on the rim parts.

II

Nor did instruction number 2 constitute a "flat misstatement of the (Missouri) law of negligence" and thereby misdirect the jury regarding Firestone's duty to warn.

Instruction number 2 (420, 421, 468; pp. 6 and 24a, Firestone's petition), was the respondent's verdict director, as prescribed by the Missouri Approved Jury Instructions (Cited MAI) (420). (As the Court of Appeals noted at footnote 3 of its opinion, the parties did not object to the use of MAI). Rule 51, Fed. R. Civ. P. requires the trial court to instruct the jury on the law applicable to the case. It is so basic as to not require citation that the substantive law applicable in this particular instance (diversity of citizenship) was that of the state of Missouri. In order to preclude endless appellate controversy (such as defendant attempts to stir here) over the propriety of instructions for a given case, the Supreme Court of Missouri in 1962 appointed a committee of practicing attorneys and law professors to study the entire subject of jury instruction and to recommend standardized instructions for the substantive law governing given fact situations. These results, in the form of recommended pattern jury instructions were adopted by Missouri Supreme Court Rule 70.01 on or about January 1, 1965. These pattern instructions contain and submit to the jury the applicable Missouri substantive law. Deviation from an instruc-

tion as contained in MAI is deemed to be prejudicial error. The theory of recovery submitted to the jury herein was defendant's manufacture of a dangerous instrumentality, coupled with its failure to exercise ordinary care to warn of such danger (468). One, and only one such instruction in this connection is permitted by or found in MAI, that being MAI 31.01 which reads precisely as follows:

> "Your verdict must be for plaintiff if you believe:
>
> First, defendant (manufactured) (designed) (sold) (furnished) (repaired) the (here describe the article such as an automobile), and
>
> Second, the (article) had (here describe defect such as a cracked left front wheel) and was thereby dangerous to persons (using it in the manner and for the purpose intended) (in the vicinity of its probable use while it was being used in the manner and for the purpose intended), and
>
> Third, defendant knew or by using ordinary care could have known of the dangerous condition, and
> Fourth, the plaintiff did not know and by using ordinary care, could not have known of the dangerous condition, and
>
> Fifth, defendant failed to warn (describe person to whom the article was delivered) of such dangerous condition, and
>
> Sixth, defendant was thereby negligent, and
>
> Seventh, while (the article) was being used in the manner and for the purpose intended, plaintiff was damaged as a direct result of such dangerous condition.

This instruction, which the Supreme Court of Missouri has declared and adopted as containing the substantive law of that state dealing with a manufacturer's duty to warn, was without deviation submitted to the jury (468).

The Missouri cases which enunciate the duty of any manufacturer in any products liability case based upon negligence simply, generally and uniformly hold that a manufacturer who fails to exercise reasonable care in the manufacture of an article which he should recognize as involving an unreasonable risk of bodily harm to those who use it and to those in the vicinity of its use, is subject to liability for harm caused to them by its use. *Wiley v. Fyrogas Co.*, 251 S.W.2d 635; *Winkler v. Macon Gas Co.*, 238 S.W.2d 386; *Orr v. Shell Oil Co.*, 177 S.W.2d 608. The rule has been construed by the Federal Courts to simply mean that a person who undertakes to furnish chattels for the use of others ordinarily assumes the conjunctive duty to furnish proper and safe appliances. *Wichman v. Allis Chalmers Mfg. Co.*, 177 F. Supp. 857, rev'd 220 F. 2d 426, Cert. denied 76 S. Ct. 71, 350 U.S. 835, 100 L. Ed.

The Missouri cases which posit Firestone's duty as a manufacturer of rims further require that it discharge that duty by exercising ordinary care to adequately warn the user, or those reasonably expected to be in his vicinity, of the danger. *Orr v. Shell Oil Co.; Winkler v. Macon Gas Co.*, supra. For instance, in *Wichman*, supra, the manufacturer was judged negligent in failing to warn the user (farm employee) of a hay baler of the dangerous condition thereof. In *Winkler*, the supplier of non-odorized propane gas was held negligent for failing to warn the user of the danger from same. In *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, the Supreme Court of Missouri held (although it reversed on other grounds) that the manufacturer of a chattel is subject to liability for injury in its use by another when the manufacturer knows or should know that the product's use is or is likely to be dangerous, and when there is no reason to believe that the user will realize it if the manufacturer failed to use reasonable care to warn the user. There, the manufacturer of drain solvent had the duty to adequately warn the user of the danger thereof. In *Spurlock v. Union Finance Co.*, 248 S.W.2d 578, the Missouri

Supreme Court held the supplier of an automobile liable to the user for the supplier's failure to warn the user of the dangers presented by a particular use of the carburetor. (Under § 388, Restatement of Torts, 2d, a manufacturer is considered to be a supplier.) In *Orr v. Shell Oil Co.*, above cited, Shell, the manufacturer, was held liable for failure to warn the plaintiff user of dangerous ingredients in chemicals which Shell furnished him. See also *Haberly v. Reardon Co.*, 319 S.W. 2d 859.

The most recent Missouri decision reaffirming this duty is *Rogers v. Toro Manufacturing Company*, 522 S.W.2d 632, decided approximately four months ago. In holding that the literature disseminated by the manufacturer of a lawn mower which allegedly vibrated into gear and injured the plaintiff did not adequately warn the user thereof, the Court very succinctly stated at page 638 of its opinion:

> "The question very simply put is: Does the instruction or warning adequately advise the user of the defect in the product and the dangers that can be expected from the failure to follow the instructions?"

Section 388 of the Restatement of Torts, which has long been adopted in Missouri (*Orr v. Shell Oil Co.*, and *Winkler v. Macon Gas Co.*, supra, decided in 1943 and 1951 respectively), and after which above mentioned MAI 31.01 was patterned, both synthesizes and construes the above stated duty to warn. After defining a supplier as any person, including a manufacturer, who in any manner furnishes a chattel for another's use, the restators in their comments note that Firestone's claimed practice of giving to third persons through whom the chattel is supplied all the information necessary for its safe use is merely a *means* by which this information is conveyed and is not in all cases sufficient to relieve the supplier from liability. There must be reasonable assurance that the information will reach those whose safety depend on it.

In that regard, the care which must be taken always increases with the danger involved. It may be reasonable to require those who supply through others, chattels which if ignorantly used involve grave risk of serious harm, to take precautions to bring the information home to the user of such chattels which it would be unreasonable to demand were the supplied chattels of a less dangerous character; furthermore, in such case it may be that the supplier does not exercise reasonable care even in entrusting the communication of the necessary information to a person whom the supplier has good reason to believe to be careful, in which event the supplier may reasonably be required to cause the chattel to carry its own warning.

It is therefore submitted that instruction number 2 did, consistent with the above rules and authorities, rightly require Firestone to exercise ordinary care to adequately warn respondent of its dangerous product, by hypothesizing in paragraph Fifth Firestone's failure to warn and by next conjunctively requiring in paragraph Sixth a finding that that conduct was negligent.[1]

Therefore, the instruction did not, as Firestone asserts at page 8 of its petition, direct a verdict merely upon a finding of Firestone's failure to warn, but further required the jury to find that such failure was negligent[1] under the evidence adduced.[2]

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[1] The instructions defined "negligence" as the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances (App. B, p. 26a, 27a).

[2] Although petitioner also complains at page 8 of its petition that instruction number 2 cast Firestone in the role of a guarantor, the instructions explicitly stated to the contrary, viz:

> "The manufacturer of a product is not a guarantor that nobody will get hurt if using the product. All that the manufacturer is required to do is to make a product which is free from defective and unreasonably dangerous conditions." (421, 472, 433; App. B, p. 28a)

III

Hypothetically and momentarily deciding the above two points against respondent, it is nevertheless submitted that this Honorable Court should not grant the writ of certiorari.

As Firestone repeatedly states in its petition, its single contention of error is addressed to that allegedly contained in paragraph Fifth of instruction number 2, which instruction petitioner has set out verbatim along with its alleged objections thereto at pages 6, 7 and 24a of its brief.

Since petitioner is attacking the court's instructions, it must be determined whether or not it has in the first instance preserved this point for review. The rule relating to preservation of alleged error in instructions is Rule 51, Fed. R. Civ. P. which provides in part that:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating *distinctly* the matter to which he objects and the *ground* of his objection." (emphasis added).

On its "first occasion" to object (page 6 of its petition), did Firestone *distinctly* state the matter to which it *now* in retrospect objects and the grounds of its objections? Did it distinctly (or in any other manner) state that the warning portion (paragraph Fifth) of respondent's verdict directing instruction (468), was objectional and state its grounds therefor? That petitioner did not do so is obvious when its purported objection is read in its entirety. The only objection was to the use of the word "susceptible" in paragraph Second of instruction number 2, which paragraph makes no reference to Firestone's duty to warn, but rather hypothesizes the finding that the rim parts were dangerous in the first instance. Thus, Firestone's objections to one portion of the instruction at trial (paragraph

Second) was not sufficiently distinct to bring into focus the alleged error which is now untimely alleged to have been contained in another portion (paragraph Fifth) of the instruction. *Palmer v. Hoffman*, 318 U.S. 109; *Wright & Miller*, 9 *Fed. Pract. & Proced.* §2554. In summary, an instruction cannot be objected to on one ground at trial and attacked on a different ground on appeal, nor can error be asserted on appeal with respect to one portion of the instruction when only a different portion thereof was objected to at trial. *Mathes & Devitt, Fed. Jury Pract. & Inst.*, §5.04.

The "second occasion" of Firestone's objection (page 7 of its petition) relates only to instruction number 5-B (420, 438, 470; pp. 25a and 26a, Firestone's petition), which, as petitioner states, is not the subject of its petition to this Court; however, respondent has no reservations against examining same in connection with petitioner's assignment of error.

The objection to instruction number 5-B is limited solely and only to, and sought relief only from that instruction—it sought absolutely no relief from instruction number 2. To illustrate the obviousness of this, it is only necessary to in retrospect, project that would have logically followed had the trial court done precisely what Firestone asked with respect to each instruction.[3] As previously emphasized, Firestone's only objection to instruction number 2 was to the use of the word "susceptible" contained in paragraph Second. Had the court sustained that objection and given Firestone all the relief it then sought with

[3] A rational corollary to the above-mentioned requirement of Rule 51 is that the party alleging error in an instruction on appeal must first have given the trial court the opportunity, which it refused, to correct any error appearing in the instruction complained of, by at trial stating distinctly the matter to which he objects and the grounds of his objection. In other words procedural Rule 51 very effectively discourages the practice of "sand bagging" which is possible in the few state courts which still allow objections to instructions to be raised for the first time on appeal.

respect to that particular instruction, the only result would have been to change the word "susceptible" in paragraph Second and to do nothing with paragraph Fifth. This would have left paragraph Fifth of instruction number 2 precisely in its present form after having given Firestone all the relief it asked for when it should have asked. Next assume that the court had sustained Firestone's objection with respect to instruction number 5-B and had refused that instruction in its entirety. The overall result after having sustained both of Firestone's "objections" would still have been to include paragraph Fifth of instruction number 2 in its present form, because neither "objection" was addressed to that paragraph at trial.

This, then, is why the Court of Appeals accurately and rightly held that Firestone made only a very narrow and ineffective objection to the instructions (although it was given *three* separate and distinct opportunities to do so, twice before the charge was read to the jury and once thereafter (421-422; 438-439; 473)), for which reason that supposed error was not preserved for appellate review (App. A., p. 10a).

CONCLUSION

It is very respectfully submitted that petitioner has utterly failed to demonstrate any special or important reasons required by Rule 19 why this Court should review the judgment of the Court of Appeals; on the contrary, there appears to be no ground for granting a writ of certiorari, for which reason respondent should be adjudged reasonable damages for his delay, pursuant to Rule 56.

Respectfully submitted

KENNETH L. DEMENT
Attorney at Law
310 West North Street
Sikeston, Missouri 63801

GARY GARDNER
EUBANKS, GARDNER & LORENZ
Attorneys at Law
801 West Jefferson
Louisville, Kentucky 40202

Attorneys for Respondent